The University of the State of New York

The State Education Department
State Review Officer
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No. 12-185

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education.

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals, pro se, from that part of a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) be required to provide a nonpublic school placement for her son for the 2012-13 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student

suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this case, the student has received diagnoses of Down Syndrome, an attention deficit hyperactivity disorder (ADHD), and mental retardation (Dist. Ex. 11 at pp. 3-5). The hearing record reflects that the student is a very social individual but struggles with some behavioral issues, most notably inappropriate physical contact (Dist. Ex. 4 at p. 1). The student's instructional levels are significantly delayed and evaluations indicate that he functions at low cognitive levels in all domains (Dist. Ex. 5 at pp. 1-3). The hearing record indicates that the student received early intervention services and has been enrolled in district public schools since 2003 (Tr. p. 13; Dist. Exs. 11 at p. 3; 12 at p. 1). During the 2010-11 and 2011-12 school years, the student received special education and related services as a student with an intellectual disability, following an alternate assessment curriculum in an 8:1+1 special class in a specialized district public school (Tr. p. 19; Dist. Exs. 16 at pp. 1, 16; 17 at pp. 1, 16). While eligible for a 12-month program, the student did not attend school in the summer months (Tr. pp. 24, 269; Dist. Exs. 16; 17).

On January 25, 2012, the CSE convened to conduct an annual review and to develop the student's IEP for the 2012-13 school year (Dist. Ex. 2 at p. 15). The CSE recommended that the student attend an 8:1+1 special class in a specialized school for a 12-month program with the following related services: two 40-minute sessions per week of speech-language therapy in a group of three; two 30-minute sessions per week of individual physical therapy (PT); two 30-minute sessions per week of occupational therapy (OT) in a group of four; and two 30-minute sessions per week of counseling services in a group of three (id. at pp. 11-12). In addition, the IEP set forth annual goals and provided for transition activities (id. at pp. 4-10, 13-14).

At the January 2012 CSE meeting and by letter dated February 2, 2012, the parent indicated that she did not agree with the IEP and requested that a nonpublic school placement be considered (Dist. Exs. 2 at p. 16; 30). On April 18, 2012, the district conducted a psychoeducational evaluation of the student (Dist. Ex. 5).[1] The results of the psychological evaluation indicated that while the student's cognitive ability was in the extremely low range, remediation and further instruction in written expression, word reading, vocabulary, a multi-sensory approach to spelling, and a language enriched classroom would benefit the student (id. at p. 3). Additionally, related services progress reports and the hearing record indicated that while the student was making some progress with listening comprehension, physical therapy, and socialization, he had made minimal progress with respect to reading, English language arts (ELA), and counseling (Dist. Exs. 4; 7; 8; Tr. pp. 31, 253-254).

The CSE reconvened and on April 26, 2012, a second IEP was developed for the 2012-13 school year (Dist. Ex. 28). This IEP continued to recommend that the student attend an 8:1+1 special class in a specialized school and receive related services (id. at p. 10). Despite the recommendations contained in the psychoeducational evaluation, most of the annual goals and benchmarks remained unchanged. (id. at pp. 5-9). At the parent's request, the CSE considered a nonpublic school placement but rejected such a placement because it determined that the current program addressed the student's cognitive and academic needs (id. at pp. 15-16).

A. Due Process Complaint Notice

In a due process complaint notice dated May 29, 2012, the parent alleged that the student was not meeting the goals on his IEP (Dist. Ex. 1). More specifically, the parent asserted that the student could not read, write, or tie his shoes, and that he was functioning at "extremely low" levels (id.). Due to his lack of progress, the parent indicated that she "would like to see if he could progress more in a private setting" (id.).

B. Impartial Hearing Officer Decision

On June 27, 2012, the parties proceeded to an impartial hearing which, after two days of proceedings, concluded on July 17, 2012 (Tr. pp. 1-283). At the hearing, the IHO permitted the parent to elaborate on the claims made in her due process complaint notice. More specifically, the parent alleged that a 12:1+4 classroom would provide the student with the individualized instruction that was necessary for him to make educational progress and meet his post-secondary goals (Tr. pp. 14, 268-270). In light of the nature of his disabilities, the parent asserted that the

[1] The hearing record contains duplicate copies of the April 2012 psychoeducational evaluation report (Dist. Exs. 5; 29). For the purposes of this decision, only District Exhibit 5 will be cited when referring to this report.

student required a student-to-teacher ratio other than the 8:1+1 ratio that was provided for in the IEP (Tr. at p. 268). In addition, the parent argued that the limited number of off-site (and the absence of on-site) vocational training opportunities at the specialized district public school made it difficult for the student to receive vocational training (Tr. at pp. 53-55, 268). For relief, the parent requested that the student be placed in a nonpublic school setting—the Westchester School for Special Children (WSSC)[2]—at public expense (Tr. pp. 269, 278; Dist. Ex. 1).

In a decision dated August 17, 2012, the IHO held that the district denied the student a free appropriate public education (FAPE) and ordered the district to develop a new IEP for the student for the 2012-13 school year (IHO Decision at pp. 4-5).[3] The IHO determined that the student struggled with reading and literacy and had not demonstrated meaningful progress with respect to ELA and reading in his current placement (id. at p. 4). While the district alleged that the student was very low functioning and that the expectation of more progress might be unrealistic, the IHO noted that the recent April 2012 psychoeducational evaluation of the student recommended remediation in written expression and word reading, and a language enriched classroom with a multi-sensory approach to spelling, but that no services designated for such remediation were included in the April 2012 IEP (id.). The IHO further determined that the student had made minimal progress in counseling and continued to have the same issues with respect to anger and inappropriate contact (IHO Decision at pp. 4-5). Despite these repeated challenges, the IHO noted that the district offered the student the same level of group counseling sessions as in the previous year (id. at p. 5).

In light of these deficiencies, the IHO ordered that the student receive a new IEP for the 2012-13 school year to include "1:1 reading and ELA remediation daily for at least 45 minutes by a certified teacher," a "language-rich" classroom environment with a multi-sensory approach to spelling, individualized counseling services provided by a psychologist with a background in instructing students with Down Syndrome, and vocational training services (IHO Decision at p. 5). With respect to the parent's request for a publicly-funded nonpublic school placement at WSSC, the IHO determined that the parent failed to provide any evidence or testimony to support her claim that WSSC would provide the student with appropriate services designed to meet his special education needs or that a 12:1+4 classroom ratio would be beneficial to the student (id. at p. 5).

IV. Appeal for State-Level Review

On appeal, the parent asserts that her son is unable to meet the goals contained in his IEP because placement in a public school is not appropriate. For relief, the parent requests either: (1) placement of the student at WSSC, or at a similar nonpublic school; (2) remand of the matter back to the IHO to permit her to establish the appropriateness of a nonpublic school placement for the student; or (3) placement in a 12:1+4 special class with the additional services of a 1:1

[2] WSSC has been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (8 NYCRR 200.1[d]; 200.7).

[3] Neither party appeals the IHO's determination that the district denied the student a FAPE; thus, that determination is final and binding on the parties and will not be reviewed on appeal. (34 CFR 300.514[a]; 8 NYCRR 200.5[j][v][5]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

paraprofessional in the district public school. The parent also submits as additional evidence a letter from WSSC indicating the school's willingness to admit the student.

The district answers, denying the parent's assertions and requesting that the IHO's determination be affirmed. The district contends that the parent's submission of new evidence in the form of a letter from the WSSC is premature because the SRO has not yet determined if additional evidence is necessary under the circumstances. Further, the district argues that documentary evidence not presented in an impartial hearing may be considered in an appeal only if such evidence is necessary in order to render a decision. While the district recognizes that the letter was not available at the time of the impartial hearing, the district nevertheless objects to its introduction on the grounds that it is not necessary for the SRO to render a decision.

Additionally, the district asserts that once the IHO determined that the district denied the student a FAPE, it was the IHO's responsibility to fashion a remedy based upon evidence in the hearing record. Since the relief requested by the parent, a nonpublic school placement, was not supported by evidence in the hearing record, the district contends that the IHO correctly denied the parent's request.

Finally, the district contends that the doctrine of res judicata precludes the SRO from remanding this matter back to the IHO so the parent can present additional evidence in support of her claim.

V. Discussion

A. Additional Evidence

As noted above, the parent submitted one exhibit—a letter of acceptance from WSSC dated September 12, 2012—as additional documentary evidence for consideration on appeal (Pet. Ex. A).[4] Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 13-238; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, while the letter that the parent submits was not available at the time of the impartial hearing, this document is not necessary for rendering a decision in this matter. Therefore, I decline to consider the additional evidence submitted by the parent.

B. Application of Unilateral Placement Analysis

During an impartial hearing, the burden of proof is on the school district, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law §4404[1][c]; see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; M.P.G. v. New York City Dep't of Educ., 2010WL 3398256, at *7 [S.D.N.Y Aug. 27, 2010]).

[4] I note that the parent did not label the letter attached to the petition, herein referred to as Petition Exhibit A.

In this case, the parent did not unilaterally place the student in a nonpublic school or seek reimbursement for her expenses related to services that she unilaterally obtained without the consent of the district. Instead, she requested that the district be directed to provide different special education services than those listed in the April 2012 IEP; namely, placement in a State-approved nonpublic school. Since the parent sought an order directing the school district to provide different services to the student, there was no basis for the IHO to require the parent to provide evidence that the services she sought were appropriate for the student.[5] Once the impartial hearing officer determined that the district failed to offer the student a FAPE, he should have proceeded to fashion a remedy based upon the evidence in the hearing record.

Here, the hearing record contained adequate information to enable the IHO to meaningfully determine what type of additional programs and services would be necessary to aid the student in reaching the goals set forth in the IEP (Dist. Exs. 4; 5; 7; 8). According to the psychoeducational evaluation, the student would "benefit from praise, rewards and opportunities for feeling successful" (Dist. Ex. 5 at p. 3). In addition, the report recommended teacher proximity to the student to reduce distractibility, further instruction in written expression and word reading, as well as vocabulary instruction, a language-enriched classroom, and multi-sensory instruction in spelling (id.). The hearing record contained sufficient documentary evidence, in the form of progress reports, as well as testimony from the student's current teachers and related service providers, that the district public school could address the student's cognitive and academic needs and that he was making some progress in his current program (Dist. Exs. 4 at p. 2; 7; 8 at p. 2).[6]

Thus, in light of the foregoing, there is a sound basis in the hearing record for the IHO's determination that the student's IEP for 2012-13 school year should be amended to include 45-minutes daily of 1:1 reading and ELA remediation instruction by a certified teacher, a "language-rich" classroom environment with a multi-sensory approach to spelling, individualized counseling services by a psychologist with a background in instructing students with Down Syndrome, and vocational training.[7]

As noted above, while the parent does not bear the burden of proof with regard to her requested relief, she did not provide any evidence tending the rebut the district's evidence that the student did not require placement in a 12:1+4 special class to receive educational benefits. In particular, State regulation indicates that a 12:1+4 special class placement is intended for "students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment," whereas the evaluative information in the hearing record does not indicate that the student requires a program consisting primarily of habilitation and treatment (8 NYCRR 200.6[h][4][iii]).

[5] It was also inappropriate for the district to attempt to shift the burden of proof to the parent.

[6] However, the district chose not to introduce into evidence any reports of the student's progress toward annual goals contained on his prior IEPs (see 34 CFR 300.320[a][3][ii]; 8 NYCRR 200.4[d][2][iii][c]).

[7] Since the primary area of need with respect to the student's social/emotional functioning concerns developing more appropriate social interaction skills, group counseling as well as individual counseling may be advisable.

Furthermore, there is nothing in the hearing record to support her contention that the unique needs of her son can only be accommodated in a nonpublic school placement.[8]

Lastly, I note that due to the passage of time, relief in the form of a specific placement for the 2012-13 school year is no longer appropriate. At this point, the CSE has been required to reconvene and develop a new IEP for the student. In the event that the parent continues to request that the CSE consider a nonpublic school placement for her son, the CSE is required to consider her request anew and provide her with prior written notice of its decision. Both State and federal regulations require a district to provide parents with prior written notice, among other times, whenever the district proposes or refuses to change a student's educational placement (34 CFR 300.503[a]; 8 NYCRR 200.5[a]). Prior written notice must provide parents with a description of the actions proposed or refused by the district, an explanation of why the district proposed or refused to take the actions, a description of other options that the CSE considered and the reasons why those options were rejected, a description of other factors that were relevant to the CSE's proposal or refusal, a statement that the parent has protection under the procedural safeguards and the means by which the parent can obtain a copy of the procedural safeguards, and sources for the parent to contact to obtain assistance in understanding these (8 NYCRR 200.5[a][3]; see 34 CFR 300.503[b]). In the event that the parent has continued to request that the district place the student in a State-approved nonpublic school and the district has determined that such a placement is not necessary to offer the student a FAPE, the parent may file a due process complaint notice challenging the district's determination.[9]

VI. Conclusion

In summary, the hearing record contains adequate evidence to support the relief ordered by the IHO.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 6, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

[8] While I can appreciate the parent's desire to maximize the student's learning potential, the provisions contained in the IDEA ensure an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998], quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim v. Rhinebeck Central School District, 346 F.3d 377, 379 [2d Cir. 2003]). Thus, a school district is not required to "maximize" the potential of students with disabilities, but rather to provide students with an opportunity for more than mere trivial advancement (Bd. of Educ. v. Rowley, 458 U.S. 176, 189, 199 [1982]; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

[9] I note that the district is not required to consider the student's placement in a nonpublic school if it determines that a public school placement can offer the student a FAPE (see T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 341-42 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 148-49 [S.D.N.Y. 2006]).